APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr Justice Beverley.

SCHEIN (APPELLANT) *v.* THE QUEEN-EMPRESS (RESPONDENT).* 1889 *July* 18.

Appeal in Criminal Case—Criminal Procedure Code (Act X of 1882), s. 411—Bengal Excise Act (Bengal Act VII of 1878), ss. 60, 74—Appeal from sentence of Presidency Magistrate—"Like offence—" Punishment on second or subsequent conviction of offence under Bengal Excise Act.

No appeal lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200, or a further period of three months' simple imprisonment, passed by a Presidency Magistrate.

The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term "like offence" as used in s. 74 of the Bengal Excise Act.

Ram Chunder Shaw v. *The Empress* (1) followed.

THIS was an appeal against a conviction by the Chief Presidency Magistrate of an offence under the Bengal Excise Act (Bengal Act VII of 1878.) The accused, who was a licensed wholesale vendor of spirituous and fermented liquor, was charged under s. 60 of the Act, with having, on the 7th day of June 1889, sold on two different occasions imported liquor by retail, and also, on the 8th of May and subsequent dates, sold imported liquor by retail without an excise retail license. It appeared in evidence that an Excise Officer, named Siddons, sent one Ashruff with a marked rupee and two marked four-anna bits to the accused with instructions to purchase three pints of claret. Ashruff went and returned almost at once with the wine, on which the Excise Officer and others rushed into the house and forcibly took from the accused the marked money which they found on his person. In the accused's room was found a book containing entries of sales of wine, all or most of which the prosecution contended were of a retail nature. It was found that the accused had been convicted on the 8th May 1886 of an

* Criminal Appeal No. 463 of 1889, against the order passed by F. J Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 11th of June 1889.

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offence under the Act, the offence being selling two dozens of claret without a license.

The Magistrate, believing the evidence for the prosecution convicted the accused of the offence charged, and, under the provisions of s. 74 of the Act, sentenced him to pay a fine of Rs. 200 or in default to undergo three months' simple imprisonment, and also to undergo six months' rigorous imprisonment. Against that conviction and sentence the accused appealed to the High Court, upon the grounds that the evidence did not justify the conviction, and that as there was no evidence that he had been convicted of a like offence to the one charged, the sentence of six months' rigorous imprisonment was bad in law.

Baboo *Umbica Churn Bose* for the appellant.

Mr. *Acworth* for the Crown.

On the appeal being called on, Mr. *Acworth* objected that no appeal lay. He relied on the language of s. 411 of the Criminal Procedure Code, and referred to the case of *In the matter of Jotharam Davay* (1), which he pointed out had been decided under the similar provisions contained in s. 167 of the Presidency Magistrates Act (Act IV of 1877) which was then in force.

The Court here stopped Mr. *Acworth* and called on Baboo *Umbica Churn Bose*, who contended that s. 411 did not apply, but upon being referred by the Court to ss. 413 and 415 of the Code, contended that whether an appeal lay or not it was a case in which the Court should exercise its revisional powers under s. 439. He then went into the facts of the case and contended that the conviction was not justified, and that even if it was, the sentence of rigorous imprisonment was illegal as the conviction for selling without a license was not a like offence to selling retail with only a wholesale license, although he admitted that the decision in *Ram Chunder Shaw* v. *The Empress* (2) was against him.

Mr. *Acworth* was not called on.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

The first question which was raised before us was one raised by the learned Counsel for the prosecution. He contended that

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no appeal lies in this case. This is an appeal from the decision of the Presidency Magistrate inflicting a sentence of six months' rigorous imprisonment and a fine of Rs. 200, and, in default of payment of the fine, three months' simple imprisonment.

The question depends on the construction of s. 411 of the Criminal Procedure Code, which says: "Any person convicted on a trial held by a Presidency Magistrate, may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees."

In this case the Magistrate has neither sentenced the appellant to imprisonment exceeding six months nor has he sentenced him to a fine exceeding two hundred rupees. But it is contended by the pleader for the appellant that the combination of the sentences of imprisonment and fine, gives an appeal. That is not justified by the words of s. 411, and we think a reference to s. 415 makes the construction of the earlier section clear. Section 415 says: "An appeal may be brought against any sentence referred to in s. 413 or s. 414, by which any two or more of the punishments therein mentioned are combined" . . . . There is no mention of s. 411 in that section; and, according to the ordinary construction, it follows that the Legislature did not intend to apply to s. 411 the provision in s. 415, that is to say, that a combination of punishments does not give a right of appeal under s. 411, though it does so under ss. 413 and 414. Section 404 provides as follows: "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

Section 411 is the only section under which an appeal lies, and therefore it seems to us that no appeal lies in this case. In this view we are supported by the decision in *In the matter of Jotharam Davay* (1), in which s. 167 of the Presidency Magistrates Act (IV of 1877) was considered. The terms of that section are exactly similar to those of s. 411 of the Code of Criminal Procedure now in force. It is not necessary for us to go over the facts of that case. It is sufficient to say that there is no distinction whatever to be drawn between

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the circumstances of that case and the circumstances of this case. The terms of the Act they were then applying are the same as the terms of the Act we are now applying, and the reasons given by the Judges in that case seem to us conclusive on this question.

It appears that a Division Bench in another case, *viz.*, *Ram Chunder Shaw* v. *The Empress* (1), entertained an appeal in a case of this kind from the order of the Presidency Magistrate, but it is to be remarked that in that case, the question as to whether there was an appeal or not was not raised by Counsel and was not apparently considered by the Court, and so it is no assistance to us as an authority. We consider that no appeal lies in this case, but as a Court of Revision we have the right to look into the facts, and we accordingly heard the learned pleader for the appellant with regard to the facts of the case in order that we might see whether there are circumstances which would justify us in interfering under our powers of revision. Having heard the whole evidence, we think there is nothing in this case which would justify our interference.

There has been no irregularity in procedure, and we think that the Magistrate has arrived at a right conclusion on the facts of the case.

Much has been made of the fact that the witnesses for the prosecution were persons interested in getting a conviction. In cases of this kind it is impossible to put forward witnesses who are not in some degree interested. That circumstance would render it necessary for the Magistrate to examine the evidence for the prosecution carefully, but it is not a circumstance which would prevent a conviction.

It appears from the evidence in the case that there was found in the room of the accused a book containing memoranda of sales of liquors. This book was given in evidence, and in the affidavit used before us on behalf of the accused and made by a person who was in Court during the time, the deponent speaks of Mr. Siddons having said in his evidence that he found this book in the room of the accused. The book which was produc-

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ed contains a number of entries purporting to be entries ofthe sale of liquor by retail. It was suggested by the learned pleader for the appellant that possibly that was a book recording a series of purchases. We think that the only possible inference is that it is an account of sales by retail. People do not purchase by retail in order to sell wholesale. The circumstance that an account of this kind containing a number of sales of liquor by retail is found in the room of a person who has only got a license to sell wholesale, to some extent supports the evidence for the prosecution. It shows that he was in the habit of doing an act which the prosecution in this case are charging him with doing. Moreover on the question of punishment, it is evidence which the Magistrate is not only entitled to look at, but to consider to the fullest extent. On the facts, therefore, we see no reason to interfere.

There is one more question to consider. It has been argued that the Magistrate has no power to give imprisonment in this case. The Excise Act (Bengal Act VII of 1878), s. 74, under which this prosecution was instituted, provides: "Whenever any person is convicted of an offence against the provisions of this Act, punishable with a fine of two hundred rupees or upwards, after having been previously convicted of a like offence, he shall be liable, in addition to the penalty attached to such offence, to imprisonment for a period not exceeding six months." It is in evidence that the appellant was, on the 18th May 1886, convicted of the offence of selling two dozens of claret without a license under the provisions of this same Act.

The question before us is, whether the selling of wine without a license, is an offence like to that of selling wine by retail, when the vendor has got a wholesale license only. That question is concluded by the decision to which we have referred in the case of *Ram Chunder Shaw* v. *The Empress* (1). Morris and Prinsep, JJ., there said this: "It appears to us, however that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of Rs. 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term, 'like offence.'"

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That decision is an authority for saying that the Magistrate was right in the view that he took of the law. We agree with the decision, and we think that the offence of selling wine by retail, with a wholesale license, is an offence like to the offence of selling wine without a license at all; it is equally the offence of selling wine without having a license so to sell it.

It remains only to consider the question of punishment. We do not think that under the circumstances there is anything excessive in the punishment.

In the result we dismiss the appeal and decline to interfere.

H. T. H. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Pigot.

1889
August 15.

BANK OF BENGAL (PLAINTIFF) *v.* KARTICK CHUNDER ROY AND OTHERS (DEFENDANTS).*

Decree—Form of decree—Suit on Bill of Exchange—Civil Procedure Code (Act XIV of 1882), ss. 532, 538—Negotiable Instruments (Act XXVI of 1881), s. 35.

A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal.

THIS was a suit under Chapter XXXIX of the Code of Civil Procedure, brought by the Bank of Bengal against Kartick Chunder Roy, the acceptor, Gocool Chunder Mullick, the drawer, and Paul J. Valetta, the endorser, of a bill of exchange for Rs. 5,000, payable ninety days after sight. The defendants obtained no leave to defend.

The facts were that, on the 30th June 1888, Gocool Chunder Roy drew a bill of exchange for Rs. 5,000, ninety days after sight, on Kartick Chunder Roy. This bill was, on the 2nd July 1888, accepted by Kartick Chunder Roy, and was endorsed over before

* Original Civil Appeal No. 9 of 1889, against the decree of Mr. Justice Norris, dated the 18th of February 1889.